In the United States District Court for the Southern District of New York

CIVIL ACTION NO. 50-320

JACOB F. HOLMES, JAMES D. BELL, JEANNETTE P. BELL, CHARLES E. PORTEOUS, MARGARET F. SCHMUCKER, AMELIA A. MEURY, JANE S. MATHEWSON, AND G. FREDERIC HELBIG, PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA, MACON, DUBLIN & SAVANNAH RAILROAD COMPANY, AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, United States and Interstate Commerce Commission, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, move that the final judgment and decree of the District Court be affirmed.

This is a direct appeal from the final judgment and decree entered on January 16, 1950, by a district court of three judges specially constituted pursuant to 28 U. S. C. §§ 2284 and 2325, dismissing appellants' complaint which sought to set aside an order made by Division 4 of the Inter-

state Commerce Commission. Appeal was allowed on January 27, 1950, and appeal papers were served on the United States Attorney for the Southern District of New York on February 8, 1950, and on the Interstate Commerce Commission on February 7, 1950.

On June 15, 1948, the Macon, Dublin & Savannah Railroad Company applied to the Interstate Commerce Commission under Section 20b of the Interstate Commerce Act (62 Stat. 163; 49 U. S. C. 20b) for authority to extend the muturity date and otherwise to modify its First Mortgage Forty Year Five Percent Bonds and the related mortgage. Following hearings, Division 4 of the Commission on December 9, 1948, issued a report and order in which it made the necessary findings and concluded that the plan was in accord with the statutory standards prescribed in Section 20b, subject to the required assent of 75 percent of the affected bondholders. The order provided for submission of the proposal to the bondholders subject to the further determination of the Commission.[1]

Application for reconsideration of this order was filed by one of the appellants, but was denied by the entire Commission. Thereafter, the Macon, Dublin & Savannah Railroad Company submitted to the Commission proof that more than 75 percent of the affected bondholders had approved the

[1] *Macon, Dublin & Savannah Railroad Company Bond Modification*, 271 I. C. C. 376.

POOR COPY

BLEED THROUGH

proposal. On March 10, 1949, Division 4 of the Commission issued its report and order, finding that the plan conformed to Section 20b and authorizing its effectuation.[2]

Appellants brought this action in the United States District Court for the Southern District of New York, seeking to have the order of March 10, 1949, set aside on the ground that Section 20b of the Interstate Commerce Act contravened the Fifth and Tenth Amendments, and Articles I and III of the Constitution. The District Court dismissed the complaint on the ground that the court lacked jurisdiction to hear the issues raised because of appellees' failure to exhaust their administrative remedies under the Interstate Commerce Act.

The decision of the District Court is plainly correct. Section 17 (9) of the Interstate Commerce Act (49 U. S. C. 17 (9)) specifically limits suits to set aside a decision of the Interstate Commerce Commission to review of final action of the Commission as a whole, and requires the litigant to exhaust his administrative appeals from decisions of subordinate divisions within the Commission as a prerequisite. This section provides:

> When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board

---

[2] *Macon, Dublin & Savannah Railroad Company Bond Modification*, 271 I. C. C. 498.

> with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission . . . a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, *but not otherwise*. [Emphasis added.]

Section 17 (6) provides procedure for appeal to the entire Commission from a division order, and Section 17 (7) authorizes the entire Commission to reverse, modify or change a division order when such action appears to be appropriate. Section 17 (8) requires the Commission to stay the effectiveness of any outstanding order pending disposition of a petition for reconsideration.

Thus, the statute provides that judicial review is confined to those orders having the requisite finality of action by the full Commission.[3] Since

---

[3] In the conference report on the bill that became the Transportation Act of 1940, which added § 17 (9) to the Act, the Managers on the part of the House said (H. Rep. 2832, 76th Cong., 3d sess., p. 72):

A new paragraph (9) is included providing that orders of a Division, an individual Commissioner, or a Board shall be subject to judicial review as in the case of full Commission orders, *after* an application for rehearing has been made and acted upon. [Emphasis added.]

We have been able to discover five instances, in addition to

POOR COPY

BLEED THROUGH

appellants did not petition for reconsideration by the full Commission of the order of March 10, 1949, they have failed to establish the statutory basis for judicial review.[4]

---

the one at bar, where the judicial process was resorted to without compliance with the terms of § 17 (9). In two cases, the three-judge district courts held the provision to be jurisdictional and dismissed the complaints for failure of the plaintiffs to exhaust that administrative remedy. *Idaho* v. *United States*, not reported (In Equity No. 439, D. C. Utah, April 17, 1943); *C. W. Hendley & Co., Inc.* v. *United States*, not reported (Civil Action No. 581–47), D. C. Dist. Col., February 25, 1947). In two cases district courts have stated that Section 17 (9) did not require an application for reconsideration to the full Commission, but then have proceeeded to dismiss the complaints on other grounds. *Western Express Co., Inc.* v. *United States*, not reported (Civil Action No. 3317, D. C. N. D. N. Y., July 21, 1949); *J. B. Braswell* v. *United States*, not reported (Civil Action No. 1059, D. C. W. D. Texas, El Paso Div., December 22, 1949). In the *Western Express* case, Circuit Judge Chase, in a concurring opinion, stated that § 17 (9) imposed "an express limitation upon our jurisdiction" to review an order of a division of the Commission. In *Texas* v. *United States*, not reported (Civil Action No. 4004, D. C. W. D. Okla., January 26, 1949), affirmed, 337 U. S. 911, the applicability of § 17 (9) was raised by the United States in the lower court. However, the complaint was dismissed on other grounds, the court not referring to § 17 (9). In its motion to affirm the United States again raised the point, but this Court did not indicate its grounds for affirmance.

[4] The fact that one appellant had petitioned for reconsideration of the earlier interlocutory order of December 9, 1948, did not fulfill this statutory requirement. The order of December 9, 1948, is not the one here sought to be enjoined. No petition for reconsideration was made as to the order of March 10, 1949.

Appellants' assertions that the order should be set aside on the ground that Section 20b is unconstitutional affords them no greater right. As the District Court stated "We cannot assume that upon petition for reconsideration the Commission would not have reversed the order of March 10, thereby eliminating the constitutional question here presented . . . Congress must have been aware that the constitutionality of various provisions of the Interstate Commerce Act would be challenged in suits to set aside orders of the Commission. The fact that the substantive issue here presented is constitutional cannot remove the barrier to this suit interposed by Section 17 (9)."

As the District Court points out, the Supreme Court in *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U. S. 752, ruled that constitutional questions will not be considered when they might have been, but were not, raised in the course of orderly administrative process, particularly where, as here, there is no showing either of inadequate opportunity for administrative relief or of irreparable injury.

United States v. *Idaho,* 298 U. S. 105, cited in the jurisdictional statement, is not controlling. That case was decided prior to the enactment of Section 17 (9), and at that time the Interstate Commerce Act did not require application for reconsideration of a division order by the entire Commission as a prerequisite of judicial review.

POOR COPY

BLEED THROUGH

Cf. *United States* v. *Abilene R. R. Co.*, 265 U. S. 274.

We respectfully submit, therefore, that the appellants present no substantial question for the decision of this Court, and that the judgment and decree of the District Court should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.

DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commisison.

FEBRUARY 1950.

U. S. GOVERNMENT PRINTING OFFICE: 1950